85-1034

Supreme Court, U.S.
FILED
DEC 16 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

GWEN L. JACKSON, PRO SE

PETITIONER

V.

CABINET FOR HUMAN RESOURCES
COMMONWEALTH OF KENTUCKY

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

289 Hebron Lane
Shepherdsville, Ky.
(502) 957-4669 40165

December 1985

QUESTIONS PRESENTED

1. Whether a review by the state courts of a decision affirmed by a non - 706 state administrative agency (a non - state authority), where said agency according to Title VII law does not have the "exclusive right" to process allegations of discrimination, and where substantial weight was never accorded to said agencies findings, and where said agency is without jurisdiction under said law, and where the appropriate 706 state administrative agency (the State Authority) was given a full and ample opportunity to investigate and process allegations of discrimination, can be given preclusive effect with regard to a Title VII 42 U.S.C. Section 2000e discrimination case.

2. Whether the United States Congress intended an expressed or implied repeal of the Act of 1790 Section 1738, with regard to non - 706 administrative

agencies and appeals thereof, when said body authorized only those state and local administrative agencies who apply for and receive the designation of "State Authority" to be included under the Title VII law.

3. Whether the United States Congress intended to satisfy the requirements for comity, repose and federalism in expressed and specific terms when they authorized only those state and local administrative agencies who apply for and receive the designation of "State Authority" to be included under the Title VII law.

4. Whether a review by the state courts of a decision affirmed by a non - 706 state administrative agency, where the discrimination issues were never argued in any state court, and where having had argued said issues in the state courts may have resulted in the loss of the right to a de novo trial, under certain circumstances, in the federal courts,

and where having not appealed the state agencies findings in the state courts would have resulted in the forfeiture of the petitioner's right to appeal the validity of the employers' actions with regard to other state laws, regulations and procedures (laws, etc., not associated with acts of discrimination and which can only be heard in a state court on appeal from the findings of a state administrative agency), can be given preclusive effect regarding a Title VII 42 U.S.C. Section 2000e complaint.

5. Whether the state laws, rules, procedures, policies and operation of the Kentucky Personnel Board, as was implemented at the time of petitioner's personnel board hearing, conformed to the provisions of the due process and equal protection clauses of the Fourteenth Amendment.

6. Whether the circumstances surrounding petitioner's resignation negates the

hearing of his Title VII complaint in federal court.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on September 17, 1985.

OPINIONS BELOW

The opinion of the Court of Appeals

appears in the Appendix hereto, Appendix A, infra, 1a-14a. No petition for rehearing was filed. The opinion of the United States District Court for the Eastern District of Kentucky appears as Appendix B, infra, 15a-24a. No petition for rehearing was filed.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on September 17, 1985. (App. A, infra, 1a-14a). A petition for rehearing was not filed. This Petition for Certiorari was filed within ninety days of the aforementioned date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

FEDERAL LAWS AND REGULATIONS INVOLVED

1. 29 CFR 1601.21(e), rev. 7/1/79 provides:

> In making a determination as to whether reasonable cause exists, substantial weight shall be accorded final findings and orders made by designated

706 Agencies to which the Commission defers charges pursuant to Part 1601.13

2. 29 CFR 1601.21(e)(1), rev. 7/1/79 provides:

"Final findings and orders" shall mean: (i) The findings of fact and order incident thereto issued by a 706 Agency on the merits of a charge; or (ii) The consent order or consent decree entered into by the 706 Agency on the merits of a charge.

3. 29 CFR 1601.21(e)(2), rev. 7/1/79 provides:

"Substantial weight" shall mean that such full and careful consideration shall be accorded to final findings and orders, as defined above, as is appropriate in light of the facts supporting them when they meet all of the prerequisites set forth below:

(i) The proceedings were fair and regular; and

(ii) The practices prohibited by the State or local law are comparable in scope to the practices prohibited by Federal law; and

(iii) The final findings and order serve the interest of the effective enforcement of Title VII: Provided, That giving substantial weight to final findings and orders of a 706 Agency does not include according weight, for purposes of applying Federal law, to such Agency's conclusions of law (Emphasis Added).

4. 29 CFR 1601.70(a), rev. 7/1/79 provides:

Because of the large number of State

and local fair employment practice agencies, only those agencies which notify the Commission of their qualifications under section 706(c) of the Title VII and this section and request designation as "706 Agencies" or "Notice Agencies" or both will be eligible for such designation. Such notification must be submitted by written request to the Director of the Office of Field Services. The request shall include the following materials and information: . . .

CONGRESSIONAL INTENT

1. 118 Congressional Record 310 (1972) states:

   Prior to the 1972 Amendments, the EEOC was free to ignore state administrative decisions. In the Senate Debates, Senator Montoya asked Senator Williams, the floor manager of the amendments, and Senator Ervin, an opponent, to explain the purpose of the "substantial weight" directive. Senator Ervin responded that the provision's purpose was to prevent the EEOC from reversing state decisions "peremptorily." The Commission would be requied to "give due respect to the findings of the State or local authorities."

CONSTITUTIONAL AMENDMENT

1. Fourteenth Amendment to the United States Constitution

BACKGROUND

This section has been included for clarity and to assist in the avoidence of confusion concerning government agencies and the courts.

Petitioner was employed for the Commonwealth of Kentucky, Cabinet for Human Resources (former Department for Human Resources) for twelve (12) years and seven (7) months. In May 1980 the petitioner was specifically employed by the Division for Mental Health, Department (former Bureau) for Health Services, Cabinet (former Department) for Human Resources in Frankfort, Ky.

On or about April 22, 1980 petitioner learned that his name had been placed on a list of employees whoes positions were to be abolished in the near future. This information was verbally given to the petitioner by an employee who was acting in the capacity of the Acting Director of the Division for Mental Health, Department

for Health Services, Cabinet for Human Resources (CHR). That same day the petitioner confirmed what had been told to him, with the Commissioner of the Department for Health Services, CHR. The Commissioner is the second highest ranking official in the Cabinet for Human Resources. Petitioner informed the Commissioner that this was extremely unfair and very much incorrect. Petitioner requested that his name be removed from the list because the petitioner believed that his being terminated (at the time appellant believed that he was being fired) would be detrimental to future employment. As a result the petitioner submitted his resignation. At the time, the petitioner was not informed by his employer that he was actually on a lay off list and was not being fired, nor was he in any manner informed that he would lose his state reemployment rights or any right to unemployment compensation benefits due to submitting a resignat-

ion.

In exchange for the resignation the Commissioner stated that he thought that he could remove the petitioner's name from "each and every list", however, he first desired the approval of the Director of Personnel Management, CHR. On or about April 23, 1980, the Commissioner contacted the petitioner and indicated that the Director of Personnel Management had agreed and that the petitioner should submit his resignation as soon as possible that very day.

Subsequent to the resignation the petitioner learned that his name had not been physically removed from any list - and that his name was listed on a CHR April 21, 1980 "Lay Off Plan". Said plan was approved by the Director of Personnel Management, CHR on April 21, 1980 and by the Commissioner, Ky. Department of Personnel on April 22, 1980. Employees having been named and listed on the lay off plan

were not given a copy of the plan. It was later determined that any employee who desired a copy or review of the plan (list) would be required to request a review of the document under the state Open Records Law, KRS 61.870 et. seq.

In May 1980 the petitioner contacted the Equal Employment Opportunity Commission (EEOC) in Louisville, Ky. and indicated a desire to file a sex discrimination charge against the petitioner's employer (respondent). Petitioner received coorespondence from the EEOC dated May 29, 1980. On June 3, 1980 the petitioner officially filed the sex discrimination charge with the EEOC. On June 4, 1980 the EEOC deferred the charge to the appropriate State Authority - 706 Agency, the Ky. Commission On Human Rights (KCHR), located in Louisville, Ky. The KCHR decided to accept the case and to take a formal complaint, and said agency kept the case for a period of almost two (2) years.

There is little doubt that federalism, comity and repose have been fulfilled and properly served in this case.

Due to inaction by the KCHR the petitioner requested that the case be referred back to the EEOC. The EEOC dismissed the charge on June 10, 1982 after very little investigation and issued a Notice Of Right To Sue received by the petitioner via certified mail on July 6, 1982.

This Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e (1976) reverse sex discrimination case was filed in the U.S. District Court, Eastern District of Kentucky on October 4, 1982, and an Amended Complaint and an order granting said amendment was entered March 18, 1983 (App. C, infra, 25a-28a).

Petitioner applied for unemployment insurance benefits on May 19, 1980 at the Louisville Office of the Division for Unemployment Insurance, Cabinet for Human Resources. The Kentucky Division for

Unemployment Insurance (KDUI) is a state administrative agency having their own "Commission", and formal appeal and hearing procedures. Petitioners' employer, the Cabinet for Human Resources (respondent) rejected petitioner's claim for benefits on the grounds that petitioner's resignation was voluntarily given. The employer submitted claimant's (petitioner's) written resignation as part of their proof of the voluntary nature of the resignation. On June 17, 1980 a KDUI Examiner ruled on the issue of "Voluntary" termination of employment. The Examiner ruled that unemployment insurance "benefits are payable". CHR had fifteen (15) days to appeal the findings. CHR failed to appeal said decision and their right to do so expired on or about July 2, 1980. The only Ky. statutes addressing the issue of what constitues a voluntary resignation are located in KRS Chapter 341. This chapter states that a claimant cannot be

granted unemployment insurance compensation on having voluntarily resigned, without good cause, or on discharge for dishonesty.

The request for a hearing before the Ky. Personnel Board (KPB) was a multiple appeal envolving four separate areas and a variety of issues, including sex discrimination. However, it should be made clear that the petitioner did not appeal to the KPB on the grounds of having had submitted a resignation. The request for an appeal was based on the departments (CHR) failure to follow procedures and on discrimination. The KPB is a state administrative agency, it is not a designated State Authority or 706 Agency. A KPB hearing was conducted on August 28, 1980. The petitioner gave testimony and submitted any information and statistics available to him at the time. This included some 19 Exhibits.
The respondent submitted no testimony or exhibits to contradict the testimony and exhibits produced by the petitioner. The

respondent produced one (1) witness. However the witness did not give any testimony concerning any charge, including sex discrimination. The witness gave virtually the same testimony as did the petitioner at the hearing. The respondent did not even bother to deny the sex discrimination allegations.

A review of the transcript of the KPB hearing, included in the record by the petitioner, reveals that the petitioner made a showing of discrimination and at a minimum presented a prima facie case. There was evidence entered adequate to raise a presumption of sex discrimination, especially in view of the fact that the respondent did not refute any of the evidence. The KPB Examiner never required the respondent to present any evidence or testimony as concerned the allegations of discrimination.

On February 17, 1981 the KPB dismissed petitioner's appeal. Petitioner appealed

to the Franklin Circuit Court and briefed two specific non - discrimination issues. Discrimination was never argued before any state court. Franklin Circuit Court dismissed the appeal on January 6, 1982. The petitioner appealed to the Ky. Court Of Appeals and the Appeals Court dismissed the appeal. On February 28, 1983 the petitioner ask the Ky. Supreme Court for a discretionary review and said motion was denied.

STATEMENT

The charge, complaint and allegations filed with the EEOC, KCHR (State Authority) and the trial court was specifically that of reverse sex discrimination. No other forms of discrimination or any other charges were filed with the aforementioned agencies or the trial court.

The decision of the trial court (App. B, infra, 22a) stated that res judicata was based on both discrimination and the re-

signation. The judgment of the trial court granted the motion for Summary Judgment and dismissed the case (App. B, infra,24a). The appeals court while affirming the res judicata decision of the trial court, did so only with regard to the petitioner's resignation. The appeals court states that". . . (t)he (district) court, however, addressed specifically only the validity of appellant's resignation, and not the merits of his discrimination claim: . . ." (App. A, infra,7a).

The appeals court did not actually address the majority of the issues and questions before this Court, nor did the appeals court address any of the constitutional questions. The trial court did address one (1) of the more than thirty Fourteenth Amendment issues.

The Cabinet for Human Resources (respondent) has never had to face the charge that it discriminated against males in any court or administrative body. CHR has

been uncooperative, refusing to answer interrogatories when discovery was granted for a period of time by the trial court, refusing to provide requested documents and information.

CHR is the largest single employer, both governmental and in the private sector, in the Commonwealth of Kentucky.

REASONS FOR GRANTING THE PETITION

1. This Case Raises An Important Issue Of Potential Significance To Many Employees Concerning The Proposed Expansion of Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982) To Include Non - State Authorities, Non - 706 Agencies Within The Scope Of The Title VII Law

In Kremer, this Court clearly demonstrated that a discrimination case filed with the New York Human Rights Division (NYHRD) and appealed to the state courts, will receive preclusive effect in other state and federal courts. "NYHRD" is a designated state "706 Agency". Kremer does not bestow preclusive effect on non - 706 agencies, or a review thereof.

It seems correct that the U.S. Congress never intended Title VII to supercede the principles of federalism, comity and repose embodied in Section 1738, Kremer, 1888 (1982). However, the U.S. Congress did decide to take those principles and specifically spell them out in their Title VII Act. Thus, the states were included in a very specific manner in the new law and Section 706 was created.

As a result of the manner by which the U.S. Congress specifically included Federalism, Comity and Repose in their Title VII Act, the effect on the Act of 1790, Section 1738, can be assessed in either of three ways:

1. An expressed repeal of Section 1738;
2. An implied repeal of Section 1738;
3. An expressed and exclusive inclusion of comity and repose in specific terms within the actual Title VII Act itself.

There are no limitations on the number of "706 Agencies" that can be designated

within any one state. However, the burden is on the state agency to apply for said designation. The major problem as concerns the respondent is that CHR desires that the Ky. Personnel Board be a "State Authority" without the board having to apply for said designation. They desire to have all the privilages of said designation without their having to make application.

In Kremer vs. Chemical Construction Corp., 102 S. Ct. 1890 (1982), the Court clearly stated, in part:

> . . . To this end the EEOC was created and the federal courts were entrusted with ultimate enforcement responsibility. State anti-discrimination laws, however, play an integral role in the Congressional scheme. Whenever an incident of alleged employment discrimination occurs in a state or locality which by law prohibits such discrimination and which has established an "authority to grant or seek relief from such discrimination or to institue criminal proceedings with respect thereto," no charge of discrimination may be actively processed by the EEOC until the state remedy has been

invoked and at least 60 days have passed, or the state proceedings have terminated. Section 706(c), 42U.S.C. Section 2000e-5(c). Only after providing the appropriate state agency an opportunity to resolve the complaint may an aggrieved individual press his complaint before the EEOC. . . .

Kremer, 1891 states, in part:

. . . In its investigation to determine whether there is reasonable cause to believe that the charge of employment discrimination is true, the Commission is required to "accord substantial weight to final findings and orders made by State and local authorities in proceedings commenced under State or local law: pursuant to the limited deferral provisions of Section 706, but is not bound by such findings. Alexander v. Gardner-Denver Co., supra, at 48, n. 8, 94 S.Ct., at 1019, n8. (Emphasis added)

Moses H. Cone Memorial Hospital v. Mercury Construction Corporation, 103 S. Ct. 927, 937 (1983) states, in part:

. . . (t)he decision whether to dismiss a federal action because of parallel state-court litigation does not rest on a mechanical checklist, but on a careful balancing of the important factors as they apply in a given case, with the balance heavily weighted in favor of the exercise of (federal) jurisdiction.

2. Petitioner's Resignation Does Not Negate The Hearing Of This Title VII Ccomplaint In Federal Court

The Court Of Appeals decision was in error when it stated (App. A, infra, 3a), in part:

> . . . when he learned that he was on a list of persons to be laid-off. To avoid the stigma he perceived associated with a lay-off, he asked the Commissioner of the health services bureau if he could resign from his position rather than being put on the list of persons to be laid-off.

The record, and the facts in this case clearly indicate that the petitioner believed that he was being fired at the time he submitted his resignation. He was verbally notified of this impending termination more than one (1) full day prior to any other employee and he was treated differently than any other employee. The cause and catalyst for the resignation was not the petitioners desire to resign, but his having been verbally notified and his fear of being

fired. The record shows that the Commissioner, the second most highest ranking official in CHR, was well aware of the circumstances. It is the petitioners' assertion that under the aforementioned circumstances that a reasonable person would feel compelled to resign his or her employment.

Secondly, a finding by the state courts based on an appeal from a non - state authority cannot estoppel a Title VII complaint which has been filed in a timely manner in the proper federal court.

Thirdly, a third state administrative agency, the Division for Unemployment Insurance, CHR, had addressed and ruled on the issue of voluntary resignation prior to the August 1980 KPB hearing, and KDUI decided in favor of the petitioner. Said ruling was presented to KPB at petitioner's KPB hearing.

Lastly, the petitioner has presented substantial proof, including more than

thirty separate issues, indicating that the laws, rules, procedures, policies and operation of the Ky. Personnel Board did not conform to the provisions of the due process and equal protection clauses of the Fourteenth Amendment, and as such preclusive effect may not be granted to said judgment.

3. Claim Of Sex Discrimination Is Valid, Summary Judgment Is Inappropriate

The Division for Mental Health, CHR, petitioner's employer in 1980, listed the names of the (10) Division for Mental Health employees on its April 21, 1980 CHR lay off plan, including the name of the petitioner. Of this number nine (9) were male. The one (1) female employee listed for lay off was never laid off, but retained the same position, job classification and pay as she always had prior to having been listed on the lay off plan. An additional female employee

employed in the Division for Mental Health was listed on this same lay off plan as a position transfer. She was transferred to another position having a different job classification from her original position. Position transfers were not offered to any of the male employees employed by the Division for Mental Health. The Division for Mental Health employed 55 employees, 30 (54.5%) were female and 25 (45.5%) were male. However, 90% of the employees listed for lay off were male.

There was a total of 129 employees listed on the April 21, 1980 CHR lay off plan. 53 (41.1%) were female and 76 (58.9%) were male. The 129 employees listed on the April 21, 1980 CHR lay off represents slightly more than one percent (1%) of the 12,731 employees employed as of the end of 1979. Of this number 70.8% were female and 29.2% were male. The CHR employee population contained approximately 30% males, yet almost 60%

of the males were listed for lay off. Those placed on the lay off plan represent more than 1% (129 employees) of the total CHR work force, this is not a small sampling of the employee population.

The respondents have failed to meet the "Four - Fifths Rule" which is generally regarded by federal enforcement agencies as evidence of adverse impact under 29 CFR 1607.4(D). Of the 129 employees selected for lay off 53 (41.1%) were female. The 4/5's Rule indicates that a minimum of 103 female employees normally would have been selected for lay off. However, instead of selecting 4/5's of said work force the respondent only selected approximately 2/5's of the women for lay off. The facts clearly indicate that the petitioners charges are valid, and the respondent is without any defense and is attempting to prevent discovery. The petitioner has previously given notice of his intention to have

expert testimony given in court.

The decision of the Appeals Court, App. A, infra, 4a-5a, states, in part:

> . . . We note that Jackson's characterization of the lay-off plan is somewhat misleading, however, since the lay-off plan for the entire Human Resources department contained a number of women employees.

The petitioner takes issue with this statement. The Complaint filed in the trial court names the Cabinet for Human Resources as the defendant. The record in the trial court and appeals court clearly shows that the entire lay off plan is at issue. That nine of ten employees (90%) in the Division were males only helps to strengthen the Complaint. Perhaps the appeals court is referring to the appeal before the Ky. Personnel Board (KPB). Even at that early date the petitioner submitted a copy of the entire April 21, 1980 CHR lay off plan. At the time the petitioner had not reviewed the official personnel file for each of the

129 employees listed, thus it was impossible to state exactly how many females and how many males were listed on the plan. However, the KPB examiner and board could in general estimate this number by simply referring to each employees given name.

Subsequent to the KPB hearing the petitioner has continued to obtain information and data under the Ky. Open Records Act. As a result additional information and data has been obtained which further assist the proving the charges of sex discrimination.

4. The Law, Rules, Procedures, Policies And Operation Of The Ky. Personnel Board As Was Implemented At The Time Of Appellant's Personnel Board Hearing Did Not Conform To The Provisions Of The Due Process And Equal Protection Clauses Of The Fourteenth Amendment

a. The Ky. Personnel Board's Hearing As conducted on August 28, 1980 cannot meet the minimal procedural standards required by Goldberg vs. Kelly, 397 U.S. 254 (1970). as the hearing examiner did not

provide the petitioner with any opportunity to examine or question the respondents' one and only witness.

b. The Ky. Personnel Board's procedural rules are contrary to and do not conform to state statutes, as such, said rules are arbitrary and capricious.

c. The Ky. Personnel Board rules state that whenever an employee requests and is granted a continuance - for whatever cause - the back pay the employee would have normally received during the time of the continuance will be forfeited, should the employee prevail in his or her appeal. Again, the Ky. Personnel Board laws are fundamentally different from and less than that provided by the Title VII law and other state 706 - agency discrimination laws.

d. The 'Notice Of Adjusted Determination' issued by the Division for Unemployment Insurance, Department for Human

Resources with reference to the issue of "voluntary" termination of employment is entitled to preclusive effect.

e. The operational policies and procedures used by the Ky. Personnel Board in processing, investigating and hearing discrimination cases is inadequate and does not meet minimal standards.

f. The Ky. Personnel Board's hearing examiner exhibited bias and disdain for the petitioner prior to the scheduled hearing and during said hearing.

g. The Ky. Personnel Board hearing examiner failed to assure that the appellee (respondent) complied with his Order issued during appellant's hearing.

h. The relationship existing between the Ky. Personnel Board and its members and staff, the Ky. Department of Personnel and its Commissioner and staff, and the Chief Executive Office of the Commonwealth of Kentucky represented a clear and distinct conflict of interest.

i. The Kentucky laws and statutes with reference to what constitutes a "voluntary" termination of employment is being interpreted in a vague, arbitrary and a capricious manner.

j. The Ky. Personnel Board was without sufficient staffing or funding to properly process, investigare or hear discrimination cases, and the board did not operate as an independent body or in an independent manner, said operation being a conflict of interest

k. The Ky. Personnel Board failed to contact the employer to determine if the charges could be settled or reconciled prior to holding a public hearing.

l. The Ky. Personnel Board did not offer any assistance in the preperation of said discrimination charge.

m. The Ky. Personnel Board does not have any procedures to allow the board to take informal written statements concerning the specific harm that the person has

suffered or the specific act(s) that is alleged to be unlawful, prior to public hearing.

n. The procedures of the Ky. Personnel Board precludes the taking of any depositions.

o. The Ky. Personnel Board - Employee Appeal Procedures, Revised April 1971, does not contain any procedures or provisions for the issuance of any type of Subpoena.

p. The Ky. Personnel Board does not have any written procedures for the issuance of Subpoenas, or Blank Subpoenas, for the purpose of reviewing or obtaining documents and records.

q. The Ky. Personnel Board law disallows reimbursement for attorney's fees, court cost and expenses, whereas the Title VII law allows said reimbursement. The board's law is more restrictive and provides "less than" what is requied by the Title VII law.

SUMMARY JUDGMENT IS INAPPROPRIATE IN THIS CASE

Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure is appropriate only when there exists no material issues of fact for trial.

A motion for summary judgment, under Rule 56 of the FRCP, requires that the burden of showing conclusively that there exists no genuine issue as to material fact in the evidence presented to the court shall be placed upon the movant. Said evidence, along with all inferences, must be read in the light most favorable to the party opposing the motion. Smith vs. Hudson, (6th Cir. 1979) 600 F2d 60, Cert. Dismissed 440 U.S. 986 100 Sup. Ct. 195 62 LEd 2d 415. See also State Mutal Life Assurance Company of America vs. Deer Creek Park, (6th Cir. 1979) 612 F2d 256; Glenway Industries, Inc. vs. Wheelabrator-Frye, Inc. (6th Cir. 1982) 686 F2d 415; Davis-Watkins Co. vs. Service Merchandise

(6th Cir. 1982) 686 F.2d 1190.

SPECIAL NOTE

It is my understanding that a plaintiff has the right to represent themselves in Court, including the U.S. Supreme Court. While I may have the right it appears that the Court seldom grants pro se litigants an opportunity to brief the Court. I respectifully request such an opportunity. Should the Court determine that the Petition be granted I will or plan to request Oral Arguments.

Should the Court in its wisdom decide to obtain an attorney in my behalf I will accept your selection. In such an event I might recommend Professor Dean H. Rivkin, Attorney, 6608 Crystal Lake Drive, Knoxville, TN. 37919

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Sixth Court of Appeals.

Respectfully submitted,

GWEN L. JACKSON, PRO SE
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40165
(502) 957-4669

CERTIFICATION OF SERVICE

I hereby certify that the foregoing Petition for a Writ Of Certiorari, three true photostatic copies thereof, was placed in a U.S. Post Office receptacle and mailed to Mr. R. Hughes Walker, General Counsel, Cabinet for Human Resources, Office of the Counsel, 275 E. Main Street, Frankfort, Ky. 40621 on December 15, 1985.

GWEN L. JACKSON
PETITIONER

December 1985

NOT FOR PUBLICATION

APPENDIX A

NO. 84-5114

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GWEN L. JACKSON,

Plaintiff-Appellant,

v.

COMMONWEALTH OF KENTUCKY CABINET FOR HUMAN RESOURCES,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

(Decided and Filed September 17, 1985)

BEFORE: JONES and WELLFORD, Circuit Judges; and HOGAN*, Senior District Judge.

PER CURIAM. Gwen Jackson, a former Kentucky state civil servant, submitted his resignation when he learned that he

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*HONORABLE TIMOTHY S. HOGAN, United States District Court for the Southern District of Ohio, sitting by designation.

was to be laid-off from work. Subsequently he brought a state administrative action against the state claiming various errors in the process by which he was placed on the lay-off list. He sought to have his resignation vitiated, but he was unsuccessful in the agency action and a subsequent state court suit. He also filed a sex discrimination complaint with the Kentucky Commission on Human Rights, deferred to the EEOC, which subsequently issued him a right to sue letter. He then brought the instant suit in federal district court, primarily claiming sex discrimination. The district court granted defendant's motion for dismissal relying on Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982), and holding that the earlier state proceedings must be accorded res judicata effect. Because we find that the state courts' determinations that appellant voluntarily resigned precludes his claim of discriminatory termination, we AFFIRM the district

court's dismissal of his suit.

I.

Appellant had been a public employee in the Kentucky Department for Human Resources for twelve years when he learned that he was on a list of persons to be laid-off. To avoid the stigma he perceived associated with a lay-off, he asked the Commissioner of the health services bureau if he could resign from his position rather than being put on the list of persons to be laid-off. The day after this meeting, April 23, 1980, the Commissioner told him that he would accept his resignation, but told him to date it the previous day. Appellant did so, and submitted a letter of resignation, which read in part:

> It is with the utmost regret that I now tender my resignation as concerns employment with the Bureau for Health Services, Department for Human Resources.
>
> I have recently accepted a management position with a non-state government agency. Their offer of increased salary and greater responsibility is the major factor in my

leaving.

In fact, appellant did not have an offer with a "non-state government agency." The letter set May 16, 1980, as the effective date of his resignation, which was one day beyond the date scheduled under the lay-off plan. The department failed to remove appellant's name from the lay-off list as they had agreed, but rather circulated an amendment to the lay-off plan which deleted appellant's position number and made other unrelated corrections.

Subsequently, appellant learned that of the fifty-five employees in his Division of Mental Health, more than half were female but all nine individuals included in the lay-off were male; in fact, one female employee who had been scheduled for a lay-off was not laid-off. We note that Jackson's characterization of the lay-off plan is somewhat misleading, however, since the lay-off plan for the entire Human Resources department contained a

number of women employees.

After appellant filed charges with the EEOC, it issued appellant a right to sue letter holding "no reasonable cause was found to believe that the allegations made (were) true." Appellant specifically charged in the EEOC complaint, "I believe I was compelled to resign, was slated for lay-off, and discriminated against because of my sex, male."

On the same day he filed his discrimination claim, appellant also filed an appeal with the Kentucky Personnel Board seeking to set aside his resignation. The State Personnel Board held a hearing on August 28, 1980, during which appellant testified in part:

> I gave the resignation because I felt that the lay-off was done in an unfair, discriminatory manner, I felt that it was unfair in a variety of ways, no less than sex and age discrimination.

On November 19, 1980, the Personnel Board filed its findings of fact, which in part

stated:

> the agencies (sic) argument is that the appellant cannot have the best of two worlds. Their contention is that the appellant could have waited until his lay-off becomes (sic) effective and appealed that decision - placing the burden of proving the legality of the lay-off on the agency - or attacking the legal validity of his "resignation" prior to the lay-off putting the burden on appellant to prove the illegality of said resignation - but that appellant cannot appeal both actions - the lay-off and the resignation. The hearing officer agrees with this conclusion of law.

The hearing officer, however, not only found that appellant's resignation had been accepted in good faith, but also held that appellant failed to prove his allegations of sex discrimination, by concluding:

> The appellant has failed to carry the burden of proof relating to his resignation being involuntary or coerced. The resignation was voluntary, freely given and rightfully accepted by the appellee agency who (sic) carried out their obligations thereunder.
>
> The appellant has also failed to prove any of the alleged discriminatory practices he claims imposed upon him by the appellee agency.

The hearing officer recommended dismissing appellant's appeal, and on February 17, 1981, the full Board affirmed the hearing officer's findings and conclusions, and adopted his recommended order.

The Franklin Circuit Court affirmed the order of the state personnel board on January 6, 1982. The court noted that the Personnel Board had made two specific findings of fact: that appellant's resignation was freely made and accepted in good faith, and that there was no showing of discrimination by the department for human resources. The court, however, addressed specifically only the validity of appellant's resignation, and not the merits of his discrimination claim:

> The evidence taken by the Personnel Board indicates the plaintiff-appellant knew precisely what he was doing when he submitted his resignation. Further the Board accepted it in good faith, and without a show (sic) of discrimination.

The court apparently viewed appellant's discrimination claim as referring to the

acceptance of his resignation. This is not what appellant attempts to show in his federal claim; rather, he attempts to show that the lay-off list itself was discriminatory, and that his resignation was precipitated by the inclusion of his name on the lay-off list.

Appellant then appealed to the Kentucky Court of Appeals, which affirmed the lower court's holding. The Court of Appeals correctly characterized plaintiff's claims as questioning the validity of the resignation and the legality of the lay-off plan. The court specifically held:

> Having concluded that (appellant) voluntarily resigned and was not terminated pursuant to the lay-off plan, we need not reach the issue of the validity of the plan. We do note in this regard, however, that appellant presented absolutely no evidence before the board that the plan was discriminatory. Appellant's opinions and personal observations are an insufficient basis upon which to ground his charges of discriminatory treatment.

(Emphasis in original). On February 28, 1983, the Kentucky Supreme Court denied

appellant's motion for discretionary review.

In neither brief to the Kentucky courts did appellant raise a discrimination claim. Appellant rather merely claimed that his resignation was invalid and that his name had been included on the lay-off plan without the correct procedures being followed. Appellant was represented by counsel in those two proceedings, but has prosecuted his federal suit and this appeal pro se.

II.

As noted earlier, on June 10, 1982, the EEOC issued a right to sue letter, after which appellant brought suit in federal district court again claiming that his resignation was ineffective and claiming that he had been discriminated against. The district court granted defendant's motion for summary judgment on the basis of res judicata, relying on

Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982).

In Kremer, the Supreme Court held that a federal district court must give preclusive effect to a state court decision upholding a state administrative agency's rejection of employment discrimination claims.[1] Id. at 466-67. Plaintiff there had claimed employment discrimination in his lay-off from a private company. He filed a complaint with the EEOC, which referred his charges to the state division of human rights. The state agency found

1. Appellant attempts to distinguish Kremer by noting in this case that the state court was not affirming a Section 706 agency's determination. The Supreme Court in Kremer held that the federal courts must give res judicata effect to a state court's factual and legal determinations concerning employment discrimination. As long as the state agency had jurisdiction to reach the discrimination issue it is irrelevant that the agency was not a Section 706 agency. The Kentucky Personnel Board did have jurisdiction to reach appellant's discrimination claim. Ky. Rev. Stat. 18.270 (Board may award such relief that will make an employee who has been subject to discriminatory actions).

no probable cause to believe that plaintiff had been subject to discriminatory practices. Plaintiff then filed a petition in state court to set aside the adverse administrative determination. The state court affirmed the agency. The EEOC subsequently issued a right to sue letter finding no reasonable cause to believe that the charge of discrimination was true, and plaintiff brought a Title VII suit in federal district court. The court dismissed the case on res judicata grounds, the Court of Appeals affirmed, as did the Supreme Court.

While in Kremer, plaintiff had only alleged a discrimination claim, and the state agency responsible for handling discrimination claims clearly addressed the issue, in the instant case, the state agency and the state court each stated that their primary ground for dismissing appellant's complaint was because they found he had not been compelled to, but

rather had voluntarily resigned. This finding necessarily precludes appellant's assertion of discriminatory termination. The agency and the courts furthermore noted that appellant completly failed to prove any sex discrimination in the state's actions.

Elliott v. University of Tennessee, 766 F2d 982 (6th Cir. 1985), instructs that the res judicata principles of Kremer encompass two forms of preclusion: claim preclusion and issue preclusion. Id. at 986 n.1. In order for issue preclusion to bar appellant's discrimination claim, there must have been a decision in a different proceeding between the same parties in which the court decided an issue of fact or law necessary to its judgment. Id. In the instant case the Kentucky courts stated that they did not need to reach appellant's sex discrimination claim because they found that appellant had voluntarily resigned. We

must accept as correct the necessary factual determination concerning the voluntariness of appellant's resignation, and the absence of discrimination proof, despite a full opportunity to pursue it.

Under federal law, even if an employee resigns from his place of employment he may base a discrimination claim upon the doctrine of constructive discharge. See, e.g., Jacobs v. Martin Sweets Co., 550 F2d 364 (6th Cir.), cert. denied, 431 U.S. 917 (1977); Downey v. Southern Natural Gas Co., 649 F.2d 302 (5th Cir. 1981). In order to show constructive discharge, however, an employee must show that an employer has intentionally made his working conditions so unbearable that a reasonable person would feel compelled to resign. A finding that an employee voluntarily resigned is antithetical to a finding that an employee was compelled to resign. Thus, the state court's factual determination that appellant voluntarily

resigned necessarily determined that the state did not discriminatorily terminate appellant. Therefore appellant's discrimination suit must fail as a matter of law.

The district court's grant of the state's motion for dismissal if AFFIRMED, and judgment is rendered for appellee.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

CIVIL ACTION NO. 82-51

GWEN L. JACKSON PLAINTIFF

VS. OPINION AND ORDER

CABINET FOR
HUMAN RESOURCES,
COMMONWEALTH OF
KENTUCKY, ET AL DEFENDANTS

(Decided and Filed January 19, 1984)

This matter is before the Court on the motion of the Defendant, Cabinet for Human Resources, Commonwealth of Kentucky for Summary Judgment on the grounds of res judicata. The Cabinet contends that since the Plaintiff appealed to the State Personnel Board, which found that he had resigned voluntarily, and that finding was affirmed by the Franklin Circuit Court and the Court of Appeals of Kentucky, Plaintiff's Title VII claim herein is subject to the defense of res judicata. After a careful examination of the record and the

briefs of the parties, the Court agrees.

FACTS

The facts herein are correctly stated in the Defendant's Memorandum filed October 4, 1983, as follows:

Plaintiff, Gwen L. Jackson was employed under the Merit System Act (Ky. Rev. Stat. Chapter 18 (now 18A) and Title 101 Kentucky Administrative Regulations, as a Public Health Administrator II by defendant Department (now Cabinet) for Human Resources' Bureau (now Department) for Health Service, until the effective date of his resignation, May 16, 1980. Plaintiff claims in this lawsuit that his resignation was void and should be vitiated because it was given under duress. He contends that he resigned after learning that his name was on a list of employees to be terminated (more accurately, laid off) and that the layoff itself was illegal due to its alleged disparate impact against males.

As was his right under the Kentucky Merit System Act, KRS 18.270 (now KRS 18A.095) Plaintiff appealed to the State Personnel Board, alleging that, inter alia, he had been discriminated against due to his sex in being placed on the layoff plan and sought to have his resignation vitiated and to be reinstated with back pay.

Plaintiff appeared pro se, although he had the right to counsel before the State Personnel Board, and argued his case, presenting evidence to support this contention that the layoff he had faced was unfair and discriminatory due to his sex, among other reasons. Hearing Examiner, Max M. Smith, filed his Finding of Fact, Conclusions of Law and Recommended Order on November 19, 1980 and determined that Jackson had failed to prove any of the alleged discriminatory practices he claimed were imposed upon him by the agency. Jackson filed exceptions to these Findings which were overruled, and the

full Board entered an order dismissing his appeal, on the merits on February 17, 1981.

Jackson, by counsel, Hon. Don Duff, timely filed a Complaint, Petition for Review and Appeal to the Franklin Circuit Court, 48th Judicial District of Kentucky, on March 13, 1981, pursuant to KRS 18.272 (now KRS 18.100) and again raised the issue of sex discrimination as a part of his grounds for appeal. The Circuit Court reviewed the case on the record and briefs of counsel and dismissed the appeal on January 6, 1982, holding that Jackson knew precisely what he was doing when he submitted his resignation; that it had been accepted in good faith.

ANALYSIS

It is clear that the decision of the Franklin Circuit Court and the Court of Appeals of Kentucky must be give res judicata effect under the ruling of the Supreme Court of the United States in Kremer vs. Chemical Construction Corp.,

456 U.S. 461 (1982). There, the Court held that a Federal District Court is required by 28 United States Code, Section 1738 to give preclusive effect to a state court decision upholding a state administrative agency's rejection of an employment discrimination claim. The Court said that the judgment of the state court affirming the decision of a state administrative agency is entitled to the same res judicata or collateral estoppel effect as any other state judgment.

Here, the Court of Appeals of Kentucky in its appellate opinion expressly found that although Plaintiff had claimed discriminatory practices, he had introduced no evidence thereof and the Personnel Board had rejected such claim and found that he had voluntarily resigned. Therefore, the judgment of the state court concerned the same issues before the Court here, and is entitled to res judicata or collateral estoppel effect. The doctrine

of res judicata applies to matters that could have been raised as well as those that actually were raised. Although the Court of Appeals did not discuss the matter of discrimnatory practices, the Personel Board and the circuit court rejected that claim, and it is also res judicata.

Plaintiff argues that the Personnel Board was without jurisdiction to hear this matter. A study of the state statutes involved, however, would indicate that, whatever other state agencies would have jurisdiction over discrimination claims, the Personnel Board would have correlative jurisdiction where state employees are concerned. Thus, K.R.S. 18.270, in effect in 1980, provided in part:

> "If the personnel board finds that the action complained of was taken by the appointing authority in violation of laws prohibiting favor for, or discrimination against, or bias with respect to his political or religious opinions or affiliations or ethnic origin, or in violation of laws prohibiting discrimination because of such individual's sex or age or handicap,

> the appointing authority shall, not later than thirty (30) days after receipt of such findings and recomendations, reinstate the employee to his former position or a position of like status and pay, without loss of pay for the priod of his penalization, or otherwise make the employee whole." (Emphasis added)

Therefore, the Court concludes that the argument the Personnel Board had no jurisdiction is totally without merit. In any event, the state courts took jurisdiction and this argument was not raised there. It is the judgment of the state courts that is to given preclusive effect under Section 1738. It would not seem that those judgments could be collaterally attacked by second-guessing whether or not an appeal from a state administrative agency was properly heard. Certainly, the circuit court, being the state court of general jurisdiction, had jurisdiction as did the Kentucky Court of Appeals. Moreover, it was plaintiff himself who invoked the jurisdiction of the Personnel Board and the state courts.

The findings of the Personnel Board, the state circuit court and the Kentucky Court of Appeals are attached hereto and made a part hereof by reference. These documents clearly show that the issues, both of voluntary resignation and lack of discrimination were before the Franklin Circuit Court and affirmed by the Court of Appeals.

Plaintiff also argues that a determination that he was entitled to unemployment insurance was a ruling prior to that of the Personnel Board which should itself be given res judicata effect. The short answer to this argument is that such ruling never was embodied in the judgment of a court. In addition, as pointed out by the Defendant is its brief, the record of that agency is insufficient to determine exactly what was before it.

Inasmuch as the findings of the Personnel Board and the state courts mentioned above were unequivocal that Plaintiff

Voluntarily resigned and that no discriminatory policies were in effect, those holdings are res judicata in this case, and Plaintiff's complaint must be dismissed. Therefore, the Court being advised,

IT IS ORDERED AS FOLLOWS:

1. That the motion of the Defendant for Summary Judgment on the basis of res judicata be, and it is, hereby granted.

2. That a separate Judgment enter dismissing the complaint herein at the cost of the Plaintiff.

This 18th day of January, 1984.

William O. Bertelsman
JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

CIVIL ACTION NO. 82-51

GWEN L. JACKSON PLAINTIFF

VS. JUDGMENT

CABINET FOR

HUMAN RESOURCES, COMMONWEALTH OF KENTUCKY, ET AL DEFENDANTS

(Filed January 19, 1984)

For reasons stated in the Opinion and Order entered concurrently herewith,

IT IS ORDERED AND ADJUDGED as follows:

1. That the motion of the Defendant for Summary Judgment on the basis of res judicata be, and it is, hereby granted.

2. That the complaint herein be, and it is, hereby dismissed, with prejudice, at the cost of the Plaintiff.

This 19th day of January, 1984

William O. Bertelsman
JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

CIVIL ACTION NO. 82-51

GWEN L. JACKSON PLAINTIFF

VS: AMENDED COMPLAINT

CABINET FOR HUMAN RESOURCES
COMMONWEALTH OF KENTUCKY DEFENDANTS

(TENDERED on February 16, 1983)

Comes the Plaintiff and for his cause of action against the defendant states as follows:

1) This is an action brought pursuant to 42 U.S.C. section 2000e charging the defendant with unlawful employment practices, specifically that on or about April 21, 1980 plaintiff's name was placed by the defendant on a list of persons to be terminated from their employment and by placing his name on this list the defendant discriminated against plaintiff because of his sex, and this Court having

jurisdiction pursuant to 42 U.S.C. 2000e-5(3);

2) The unlawful employment practices hereinafter set forth occurred in Franklin County Kentucky which is within the eastern district of Kentucky and the venue of this action is proper under 42 U.S.C. 2000e-5(3);

3) For a period ending May 16, 1980 plaintiff was employed by the defendant (which was then known as the Department for Human Resources) as a Public Health Administrator in the Division for Mental Health;

4) On or about April 22, 1980 plaintiff was informed that his name had been placed on a list of employees to be terminated;

5) On or about April 23, 1980 plaintiff tendered his resignation from defendant's employment in consideration for defendant's promise to physically remove his name from any and all lists of employees to be terminated or laid off;

6) At the time plaintiff tendered his resignation he was unaware of evidence, later discovered, that established that sex discrimination occurred during and as a direct result of the development of the April 21, 1980 Department for Human Resources lay off plan;

7) The defendant did not cause plaintiff's name to be physically removed from all copies of lists of employees to be terminated or laid off;

8) The plaintiff's resignation was the product of a discriminatory lay off list and plan, and should in any case, be rescinded by virtue of defendant's failure to remove plaintiff's name from the termination lists;

9) Order reinstatement of plaintiff to his position as Public Health Administrator II, or a position of like status and salary, together with any and all current and back compensation and salary from May 16, 1980, including seniority,

increments and upgrades, sick leave days, annual leave days, compensatory leave credit, retirement credit and other benefits, as are permitted or provided by the Kentucky Revised Statutes, Kentucky Administrative Regulations and policies of the Cabinet for Human Resources;

10) Allow plaintiff his costs and expenses herein;

11) Allow plaintiff reasonable attorneys fees;

12) Allow plaintiff any and all other relief to which the plaintiff may be entitled.

Dated this 15th day of February 1983.

GWEN L JACKSON
PLAINTIFF
Rt. 4 289 Hebron Ln.
Shepherdsville, Ky.
40165